United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-7335

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 75-7335

FRANCIS J. MARKHAM and GEORGE W. MARKHAM,
Plaintiffs-Appellants,

against

WILLIAM H. ANDERSON, JR.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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TEXT OF NEW YORK CPLR SECTION 302

§302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives

substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(b) Personal jurisdiction over non-resident defendant. A court in any matrimonial action or family court proceeding involving a demand for support or alimony may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the obligation to pay support or alimony or alimony [sic] accrued under the laws of this state or under an agreement executed in this state.

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an

appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

UNITED STATES COURT OF APPEALS

of the

Second Circuit

CES J. MARKHAM and
GEORGE W. MARKHAM,

Plaintiffs-Appellants,

v.

ROBERT E. GRAY, THE KAPLAN
TRUCKING COMPANY and WILLIAM
H. ANDERSON, JR.,

Defendants-Appellees.

Docket No. 75-7335

BRIEF OF PLAINTIFFS-APPELLANTS

ISSUE

Does the United States District Court for the Western District of New York have personal jurisdiction over defendant Anderson pursuant to New York CPLR 302(a)(3)(ii) in that:

1. Anderson committed a tortious act without the state;
2. causing injury to a person within the state; and
3. Anderson expected or should reasonably have expected the act to have consequences in the state; and
4. Anderson derives substantial revenue from interstate commerce?

STATEMENT OF THE CASE

This is an action to recover damages for personal injuries suffered by Frances Markham as a result of the negligence of William H. Anderson, Jr. and others.

Anderson moved to quash the service of the summons and to dismiss the complaint on the ground that the United States District Court for the Western District of New York did not have personal jurisdiction over him. The injured parties assert jurisdiction over Anderson on the basis of New York CPLR 302(a)(3)(ii), in that Anderson committed a tort outside New York State that caused injury within the State and that Anderson should reasonably have expected his act to have consequences in the State and that he derives substantial revenue from interstate commerce.

The Court below (Hon. John T. Curtin), dismissed the complaint as against Anderson, finding that Anderson did not engage in interstate commerce and therefore was not within the ambit of New York's

long-arm statute. This appeal is taken from that ruling.

On February 18, 1972, Robert E. Gray, an employee of The Kaplan Trucking Company, drove a truck into the rear of a toll booth on the New York State Thruway injuring Frances J. Markham who was a toll collector inside the booth. Gray was traveling eastbound in the westbound lanes of the Thruway. Upon information and belief, at the time of the accident Gray was in a semi-comatose state. Also at that time Gray was suffering from diabetes mellitus and required insulin by injection daily.

Dr. Anderson was the physician of Gray. Dr. Anderson physically examined Gray each year for 14 years and after each examination Dr. Anderson certified that Gray was qualified to operate commercial vehicles in accordance with the Federal Motor Carrier Safety Regulations. However, due to Gray's requirement of insulin by injection, he was not physically qualified to operate motor vehicles in interstate commerce under the requirements of the Federal Motor Carrier Safety Regulations. (49 C.F.R.

§39.41)

On December 4, 1973, Dr. Anderson was personally served in Pennsylvania with the summons and complaint in the within action by the United States Marshal for the Western District of Pennsylvania. Dr. Anderson is a resident of the Commonwealth of Pennsylvania.

Interrogatories were served upon Dr. Anderson in order to establish the necessary facts for the determination of the jurisdiction issue. The answers to the interrogatories show that:

(1) Dr. Anderson is a physician licensed to practice medicine in the States of Pennsylvania, Ohio and South Carolina. His office is located in West Springfield, Pennsylvania and he has privilege to practice medicine in Brown Memorial Hospital of Conneaut, Ohio.

(2) Approximately 60% of the patients Dr. Anderson treats at his office in Pennsylvania are residents of Ohio.

(3) Approximately 75% of the patients Dr.

Anderson treats in Pennsylvania who require hospital care are sent by Dr. Anderson across a state line to Brown Memorial Hospital in Ohio. Dr. Anderson estimates that he treats at least 500 different patients at Brown Memorial Hospital each year.

(4) In order to treat his patients at Brown Memorial Hospital, Dr. Anderson himself must travel from his home and office in Pennsylvania to the hospital in Ohio. He does this seven days a week.

(5) Approximately 50% of the patients Dr. Anderson treats in the Ohio hospital are residents of Pennsylvania.

(6) Dr. Anderson reads approximately one hundred electro-cardiograms for the Ohio hospital each month for a fee of $6.00 per reading. The Doctor's Pennsylvania office bills the Ohio hospital directly for this service.

(7) Dr. Anderson's income for the year of

1973 was approximately $88,000.00.

ARGUMENT

POINT I. ANDERSON COMMITTED A TORTIOUS ACT WITHOUT THE STATE CAUSING INJURY TO MRS. MARKHAM WITHIN THE STATE.

Each year for fourteen years Dr. Anderson examined Gray in order to determine if Gray was qualified to operate vehicles in interstate commerce pursuant to the Federal Motor Carrier Safety Regulations. Each year Dr. Anderson was aware of Gray's condition of diabetes mellitus requiring insulin for control. Each year Dr. Anderson certified Gray as fit to drive under the regulations.

Section 391.41(b) of the Motor Carrier Safety Regulations (49 C.F.R. 391.41) states:

> "A person is physically qualified to drive a motor vehicle if he -
> ...(3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control."

Section 391.43 of the Motor Carrier Safety Regulations prescribes the examination form on which Dr. Anderson certified Gray's fitness. That form, pursuant to the regulation, states on it:

> "Diabetes. If insulin is necessary to control a diabetic condition, the driver is not qualified to operate a motor vehicle."

After examining the driver, the doctor subscribed the certificate cortaining the quoted language.

The wrongful certification of Gray as being fit to drive constitutes a tort. See Restatement of Torts (2d), Section 311(1)(b). Since the certification took place at the Doctor's office in Pennsylvania, it is a tort which was committed outside the State of New York.

Mrs. Markham was within the State of New York when Gray drove his truck onto her toll booth. As a result of the impact, she suffered severe injuries. Therefore the tortious act caused injury within the state.

POINT II. ANDERSON SHOULD REASONABLY HAVE EXPECTED HIS TORTIOUS ACT TO HAVE CONSEQUENCES IN NEW YORK.

As the Court below held, "Dr. Anderson, by certifying that Gray was qualified to operate a commercial vehicle in interstate commerce, should reasonably have expected his acts to have consequences in New York."

In Allen v. Auto Specialities Mfg. Co., 45 A. D. 2d 331 (3d Dep't. 1974), the court held that "The test of whether a defendant expects or should reasonably expect his act to have consequences within the State is an objective rather than a subjective one. (Brown v. Erie-Lackawanna R.R. Co., 54 Misc. 2d 225.) Moreover, the statutory requirement of foreseeability relates to foreseen consequences generally and not to the specific event which produced the injury within the State." (p. 333).

Dr. Anderson certified Gray as being fit to engage in interstate commerce. Dr. Anderson knew that Gray worked for The Kaplan Trucking Company which operates in New York State. Therefore, Dr.

Anderson should reasonably have expected his act to have consequences in New York, his own neighboring State.

POINT III. ANDERSON IS ENGAGED IN INTERSTATE COMMERCE.

New York CPLR 302(a)(3)(ii) requires that the tortfeasor derive substantial revenue from interstate commerce. But the phrase "interstate commerce" is not defined in either the statute or in the legislative history of the statute. Nor do any judicial opinions in New York deal specifically with the meaning of the phrase as used in that section.

However, the New York Courts in Gluck v. Fasig Tipton Co., 63 Misc. 2d 82 (Sup. Ct. New York Co., 1970), had occasion to interpret CPLR 302(a)(3)(ii) under a very similar fact pattern. In Gluck, the plaintiff purchased a mare at an auction sale in the State of New York. One of the defendants was a veterinarian who falsely certified that the mare was pregnant. The veterinarian was domiciled in Kentucky and service of process was made in Kentucky under

CPLR 302. The defendant moved to dismiss the action on the ground of lack of personal jurisdiction in New York. The Court, in considering whether the defendant derived substantial revenue from interstate commerce, examined the financial information submitted by the defendant. The Court found that in each of the previous three years, the defendant received less than 1% of his income from veterinary services rendered outside the State of Kentucky. The Court found that that did not constitute substantial revenue and granted the motion to dismiss; but the implication of that case is that if the veterinarian did a greater percentage of out of state services, he would then derive substantial revenue from interstate commerce and would thereby be subject to New York jurisdiction.

In the absence of any specialized or particular definition of "interstate commerce" in the long-arm statute itself, and in the absence of any indication that the legislative intent was to give those words a special meaning, it must be presumed that the legislature used the term in its common and cus-

tomary sense. Since the writing of the federal Constitution, the term interstate commerce has universally been used to mean the subjects which Congress may regulate pursuant to Article I, Section 8, clause 3, of the United States Constitution (commonly referred to as the Commerce Clause). See, e.g., 32 N.Y. Jur., Interstate and Foreign Commerce.

The general term "interstate commerce" has been expansively defined by the United States Supreme Court, lower federal courts and courts of New York. It includes not only those transactions which are regulated by Congress, but also those transactions which could be regulated by Congress as a matter of constitutional law.

In the early case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824), Chief Justice Marshall said:

> "The subject to be regulated is commerce, and...to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the

> interchange of commodities ...but it is something more; it is intercourse...between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

It has long been clear that interstate commerce need not involve goods and that persons crossing state lines are in interstate commerce. In Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 F. 1, 17, the Court said:

> "All interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce." (Emphasis supplied.)

The United States Supreme Court has left no doubt that the crossing of state lines is, without more, interstate commerce. In Atlanta Motel v. United States, 379 U. S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 the Supreme Court said:

> "That the 'intercourse' of which the Chief Justice (Marshall) spoke included the movement of persons through more states than one was settled as early as 1849, in the Passenger Cases..."

Such broad constructions of interstate commerce have been approved by New York Courts. In People v. State Tax Commission, 245 App. Div. 229 (3rd Dep't, 1935) the Appellate Division stated:

> "By the adoption of the United States Constitution, the state conferred upon Congress the power to regulate commerce with foreign nations and among the several states. The words used in the Commerce Clause of the Constitution are to receive a broad

and liberal application." (Emphasis supplied.)

And it has been said that "Even isolated movements of single individuals or small amounts of private property across state lines are subject to congressional regulations under the commerce power." 32 N. Y. Jur., Interstate and Foreign Commerce §3, p. 207.

In the instant case, the District Court ruled that the activities of a doctor cannot be considered commerce since "...the practice of medicine has been said to be neither trade nor commerce within Section 1 of the Sherman Antitrust Act. Regal v. Washington Medical Society, 249 F. 2d 266 (8th Cir. 1957)." The court relied on the then established dichotomy in dealing with the trades and the "learned professions."

Since the issuance of the District Court's opinion, the basis for the dichotomy of treatment has been destroyed by the Supreme Court's decision in Goldfarb v. Virginia State Bar, _____U. S. _____ (1975). In Goldfarb, the Supreme Court found that the services of a "learned profession," (i. e., the

practice of law) was commerce within the Sherman Antitrust Act. "Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect..."

The business of Dr. Anderson is commerce. The classification of his occupation as a profession does not detract from the fact that he provides a service in exchange for money.

Since Dr. Anderson regularly and systematically crosses state lines to practice medicine in more states than one, since the doctor's reputation and prestige cause persons who constitute the majority of his patients to regularly and systematically cross state lines to receive his treatment, since Dr. Anderson regularly and systematically sends patients needing hospital treatment across state lines to receive such treatment, and since Dr. Anderson provides services to the hospital in one state and bills for the services in another state,

there can be no doubt that Dr. Anderson's business and conduct constitute "interstate commerce" within the federal and state definitions of the phrase.

Not only does Dr. Anderson's business, in general, involve interstate commerce, but the act which gave rise to the instant litigation is directly related to interstate commerce. The gravamen of this action against Dr. Anderson is that he wrongfully certified defendant Gray as being physically fit to drive a truck in interstate commerce.

POINT IV. ANDERSON DERIVES SUBSTANTIAL REVENUE FROM INTERSTATE COMMERCE.

In the recent case of Allen v. Auto Specialities Mfg., 45 A. D. 2d 331 (3d Dep't., 1974), the New York Appellate Division stated:

> "What constitutes 'substantial revenue' under CPLR 302 (subd. [a], par. 3, cls. [i] and [ii] is not defined in the statute. The phrase should be construed to require comparison between a defendant's

> gross revenue from interstate or international business with total gross...revenue, and between a defendant's net profit from interstate or international business with total net profit."

A similar interpretation was used by the court in Gillmore v. Inskip, Inc., 54 Misc. 2d 218 (Sup. Ct., Nassau Co., 1967). The Gillmore case also held that on a motion to dismiss for lack of personal jurisdiction under CPLR 302",..it is up to defendants to show the absence of substantial revenue."

Gonzales v. Calorific Co., 64 Misc. 2d 287 (Sup. Ct., Queens Co., 1970), stated that "It must be noted that there need be no connection between the tortious act and the deriving of substantial revenues from interstate or international commerce." See also Gillmore v. Inskip, Inc. (Supra).

In the instant case, Dr. Anderson's answer to the interrogatories show that approximately 50% of the patients he treats in the Ohio hospital are Pennsylvania residents; approximately 75% of the

patients Dr. Anderson treats in Pennsylvania who require hospital care are sent by him to Ohio. Dr. Anderson treats approximately 500 patients in the Ohio hospital each year.

Dr. Anderson reported an income last year of $88,000.00. Given the data detailed above, it is reasonable to assume that substantially more than half of that income was generated by patients who crossed a state line in order to receive treatment, and/or by Dr. Anderson's crossing a state line in order to administer treatment or perform services.

POINT V. ANDERSON'S BUSINESS IS NOT LOCAL IN NATURE.

Dr. Anderson has argued that his business, a professional practice, is by its nature a local business and therefore not within the spirit of the New York long-arm statute.

But Dr. Anderson also has stated in the answers to the interrogatories that he is licensed to practice medicine in three states and daily does so in two states.

In Goldfarb v. Virginia State Bar, _____U.S. _____ (1975), the Supreme Court said:

> "In the modern world it cannot be denied that the activities of lawyers plays (sic) an important part in commercial intercourse..."

Also,

> "Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions we conclude that interstate commerce has been sufficiently affected."

So too do the activities of the medical profession play an important part in interstate commerce. For example, witness the following facts published in the United States Department of Commerce, Statistical Abstract of the United States (1974):

> (1) In 1973, approximately $94,070,000,000 was spent in national health expenditures.

That was 7.7% of the gross national product;

(2) In 1972, in the United States, $17,325,000,000 was spent for physicians services; and

(3) In 1972, the hospitals in the United States had assets in the amount of $43,157,000,000 and had personnel numbering 2,671,000.

It cannot be questioned that the provision of health care is a tremendous business involving the regular transportation of goods, people and information across state lines. The part that physicians play in commercial intercourse should not be minimized because of their professional status.

The Supreme Court, in Goldfarb, said that "Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes." In the case at bar, Dr. Anderson's business, as a matter of law and practical necessity, is an integral

part of the interstate commerce aspects of the medical business. The referral of patients and information from one state to another is the common denominator of the interstate transactions. Dr. Anderson's business is therefore involved with interstate commerce for the long-arm statute purposes.

Dr. Anderson has also argued that it is unfair to compel him to defend a suit in a foreign forum. Factually, the United States District Court for the Western District of New York is approximately 110 miles from Dr. Anderson's residence and place of business. Also, whatever inconvenience is alleged on the part of Dr. Anderson in defending a suit in an out-of-state forum is actually fictional in that the real party in interest is Dr. Anderson's insurer. Upon information and belief, Dr. Anderson is insured by the Hartford Insurance Group, which has an obligation to defend and indemnify the defendant in this suit. The insurer does business in all jurisdictions, and it cannot truthfully be alleged that it would prejudice or inconvenience the insurance

company to defend a suit before this Court.

Moreover, the major part of Dr. Anderson's income depends upon his ability to attract Ohio residents to cross the state line to receive his care and upon his ability to cross a state line to administer treatment and care. Given the amount of money which is therefore generated by interstate commerce and which Dr. Anderson receives each year, it is not unreasonably burdensome or onerous for him to defend a lawsuit in a jurisdiction other than Pennsylvania.

CONCLUSION

The United States District Court for the Western District of New York has personal jurisdiction over Dr. Anderson pursuant to New York CPLR 302(a)(3)(ii) in that Dr. Anderson committed a tort outside the state which caused personal injury within the state, and that the consequences of his act should reasonably have been expected and that he derives substantial revenue from interstate commerce.

Therefore, the judgment of the Court below should be reversed.

Dated: August 8, 1975.

Respectfully submitted,
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STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

Jacob D. Rothstein, being duly sworn, deposes and says, that he is over 18 years of age. That on the 12th day of August, 1975, he served 2 copies of the attached Brief on the attorneys for the Defendant Appellee and the Defendants herein by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a U. S. Post Office at 90 Church Street, New York City, directed to said attorneys at their respective addresses as follows:
John M. McLaughlin, Esq. attorney for Appellee 23 West 10th St. Erie, Pa. 16501
John Napier Attorney for Defendant Atty for Kaplan Trucking Company
620 Liberty Bank Building Buffalo New York 14204 and Trustee
Donald B. Eppers, Esq. Atty for Defendant Robert E. Hoyt Trucking Company
290 Main Street Buffalo, N.Y. 14202
that being the place where they maintain their an offices for the regular transaction of business, and the last addresses mentioned in the papers last served by them.

Jacob D. Rothstein

Sworn to before me this
12th day of August, 1975.

Francis R. Jones

FRANCIS R. JONES
Notary Public, State of New York
No. 24-1759220
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

Service of three ③ copies of the within
is admitted this day of 19

_____